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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 CARL MONTIGUE LEWIS,

11 Petitioner,

No. CIV S-03-1410 GEB EFB P

12 vs.

13 DAVID L. RUNNELS,

14 Respondent.

FINDINGS & RECOMMENDATIONS

15 _____/
16 Petitioner is a state prisoner proceeding through appointed counsel with an application
17 for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges a 1999 judgment of
18 conviction entered against him in Sacramento County Superior Court on charges of first degree
19 felony murder and first degree burglary. He seeks relief on the grounds that, allegedly: (1) his
20 right to due process was violated by jury instruction error; (2) the evidence was insufficient to
21 support the burglary felony-murder special circumstance; and (3) his constitutional rights were
22 violated by the prosecutor's improper use of peremptory challenges to exclude two black women
23 from the jury. Upon careful consideration of the record and the applicable law, the undersigned
24 recommends that petitioner's application for habeas corpus relief be denied.

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1 **I. Factual Background¹**

2 During the summer of 1998, Adams, 18 years old at the time, lived
3 in the Pheasant Pointe Apartments in Sacramento. Lewis, who
4 was 27 years old, frequently visited the same apartments, where he
5 met and became friends with Adams. They also became
6 acquainted with Jovan Hall.

7 *Robbery of Steve Baker*

8 On July 28, 1998, at about 1:00 a.m., Adams or Lewis kicked in
9 the door of an apartment in the Stonecreek Apartments, across the
10 street from the Pheasant Pointe Apartments. One of the occupants
11 of the apartment, Steve Baker, came out of his bedroom to
12 investigate the noise and was confronted by Adams, who said:
13 “Where’s the money?” Adams threatened to kill Baker if Baker
14 called 911. Baker said he had no money, so Adams slapped him
15 on the chest several times and again demanded to know where was
16 the money. Lewis entered the apartment and grabbed a VCR,
17 which Adams pointed out to him. Adams took a watch, cellular
18 phone, wallet, and keys that were on top of a piano, and both
19 Adams and Lewis left the apartment. Adams returned to the
20 apartment the next day and tried to gain access using the keys he
21 had taken but was scared off by Alan Sheridan, another resident of
22 the apartment. Adams and Lewis later bragged and laughed about
23 the robbery.

24 *Murder of Jean Suter*

25 At about 9:20 p.m. on August 6, 1998, the power went off in the
26 Pheasant Pointe Apartments and the Stonecreek Apartments across
the street. Adams, Lewis, and Hall were together in the Pheasant
Pointe Apartments. They huddled together and whispered to each
other, then borrowed a flashlight and went across the street to the
Stonecreek Apartments.

Dennis Sawyer, a security guard on duty in the Stonecreek
Apartments, encountered 80-year-old Jean Suter, a Stonecreek
tenant, on a walkway. She did not have her purse. They briefly
discussed the power outage, after which Suter headed off in the
direction of her apartment. After Suter left, Sawyer saw Adams
approach carrying what was later identified as Suter’s purse.

About five minutes later, Lewis stood on a garbage can and
jumped over a fence surrounding the pool area. On the ground in
the pool area, he left the flashlight the men had borrowed. After

¹ The following factual and procedural summaries are drawn from the January 8, 2002 opinion by the California Court of Appeal for the Third Appellate District (hereinafter Opinion), at pgs. 2-7, filed in this court on January 21, 2004, as Exhibit D to respondent’s answer.

1 jumping over the fence, he shouted: "Damn you, Jovan." He
2 encountered Norma Stang, another Stonecreek tenant, and said,
3 "Out of my way, bitch." He bumped into her as he headed out of
4 the apartment complex.

5 Sawyer, having heard the commotion caused by Lewis's use of the
6 garbage can, went to the pool area and spoke to Stang. She
7 pointed out the flashlight. On his way around to get inside the
8 pool area to retrieve the flashlight, Sawyer found Suter lying on
9 the ground directly in front of her apartment. She was trying to get
10 up but could not. Asked what had happened, she replied that she
11 did not know what had happened or where she was. Sawyer told
12 her she was in front of her own apartment. The door was wide
13 open. He helped her to her feet and into the apartment. By the
14 light of the flashlight he was carrying, Sawyer did not notice any
15 injuries on Suter. To him, she did not seem to be in pain or to have
16 difficulty breathing.

17 Adams and Lewis returned to the Pheasant Point Apartments with
18 Suter's purse, which contained her cellular phone and credit cards.
19 Calls were made on Suter's cellular phone that evening and the
20 next day to Adams's girlfriend, Adams's uncle, Hall's cousin, and
21 a friend of both Hall and Adams.

22 Adams and Lewis went with a friend to get marijuana. While in
23 the car, Lewis chided Adams, saying: "I should kick your ass for
24 leaving me." And later: "I had to hit this mother fucker upside the
25 head." Adams grinned, but seemed to be afraid of Lewis.

26 The next day, on August 7, 1998, Suter was found in her bed in a
coma and near death. She had injuries from four separate blunt
force blows. Two blows to the head causing bruising, swelling,
and a subdural hematoma. Two blows to the body caused bruising,
swelling, a broken clavicle, a broken rib, and a punctured lung.
These forceful blows could have been inflicted by the flashlight
Adams and Lewis took to the apartments. An investigation
revealed vomit on the floor in front of the chair where Sawyer left
Suter, in the bathroom sink, and in the toilet bowl. Suter was taken
to the hospital and put on life support.

The screen from the window to Suter's bedroom was lying on the
ground and there were shoe prints on the window sill that were
consistent with some of the shoes later seized from Adams and
Lewis. Suter's purse and a jewelry box from her bedroom were
missing. Several drawers of the dresser and filing cabinet were
open.

Also on August 7, 1998, Adams went to Arden Fair Mall with
Suter's credit cards and cellular phone. He and a friend used the
cards to make purchases. When Lewis heard about Suter's death

1 from a television report, he caught a bus to Colorado, where he had
2 a job offer.

3 When it became clear, on August 8, 1998, that further treatment
4 would be futile, Suter was taken off life support, and she died. An
5 expert opined that Suter could have sustained her injuries before
6 Sawyer found her outside her apartment. The brain injury would
7 have caused her slowly to deteriorate but was still consistent with
8 moments of lucidity during which she encountered Sawyer, went
9 into the bathroom, and got into bed.

10 Adams was arrested on August 8, 1998. He admitted going to the
11 Stonecreek Apartments during the power outage to commit a
12 burglary. He stated that he entered Suter's apartment through the
13 front door and took her purse. He saw Suter as he was leaving the
14 area. Lewis was arrested in Colorado on August 21, 1998. He
15 also admitted involvement in the burglary during the power
16 outage. He entered the apartment through the window, stole the
17 jewelry box, and exited through the front door. He claimed he
18 bumped into an elderly woman and she spun around but did not
19 fall down. He jumped over the pool fence and lost the flashlight
20 he was carrying.

21 **II. Procedural Background**

22 Adams and Lewis were charged and convicted by jury of robbery
23 of Steve Baker, residential burglary, and first degree murder of
24 Jean Suter. The jury also found true the special circumstance that
25 the murder was committed during the commission of burglary.
26 Hall was also charged with residential burglary and first degree
murder but was acquitted of the charges. Adams and Lewis were
each sentenced to life without possibility of parole for first degree
murder with the sentence for burglary stayed, plus four years for
robbery.

19 Petitioner filed a timely appeal of his conviction in the California Court of Appeal.
20 Answer, Ex. A. The Court of Appeal affirmed petitioner's conviction in its entirety. Answer,
21 Ex. D. Petitioner subsequently filed a petition for review in the California Supreme Court.
22 Answer, Ex. E. That petition was summarily denied by order dated March 20, 2002. Answer,
23 Ex. F.

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1 **III. Analysis**

2 **A. Standards for a Writ of Habeas Corpus**

3 Federal habeas corpus relief is not available for any claim decided on the merits in state
4 court proceedings unless the state court's adjudication of the claim:

5 (1) resulted in a decision that was contrary to, or involved an
6 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

7 (2) resulted in a decision that was based on an unreasonable
8 determination of the facts in light of the evidence presented in the
State court proceeding.

9 28 U.S.C. § 2254(d).

10 Under section 2254(d)(1), a state court decision is "contrary to" clearly established
11 United States Supreme Court precedents "if it 'applies a rule that contradicts the governing law
12 set forth in [Supreme Court] cases', or if it 'confronts a set of facts that are materially
13 indistinguishable from a decision'" of the Supreme Court and nevertheless arrives at a different
14 result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406
15 (2000)).

16 Under the "unreasonable application" clause of section 2254(d)(1), a federal habeas
17 court may grant the writ if the state court identifies the correct governing legal principle from the
18 Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's
19 case. *Williams*, 529 U.S. at 413. A federal habeas court "may not issue the writ simply because
20 that court concludes in its independent judgment that the relevant state-court decision applied
21 clearly established federal law erroneously or incorrectly. Rather, that application must also be
22 unreasonable." *Id.* at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (it is "not
23 enough that a federal habeas court, in its independent review of the legal question, is left with a
24 'firm conviction' that the state court was 'erroneous.'")

25 The court looks to the last reasoned state court decision as the basis for the state court
26 judgment. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court reaches a

1 decision on the merits but provides no reasoning to support its conclusion, a federal
 2 habeas court independently reviews the record to determine whether habeas corpus relief is
 3 available under section 2254(d). *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

4 **B. Petitioner's Claims**

5 **1. Jury Instruction Error**

6 Petitioner raises a claim of jury instruction error. He claims that the trial court's
 7 instruction to the jury regarding the "escape rule" for burglary rather than an instruction on "one
 8 continuous transaction" violated his due process rights.

9 **a. Legal Standards**

10 A challenge to jury instructions does not generally state a federal constitutional claim.
 11 *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir.
 12 1985); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983). However, a "claim of error
 13 based upon a right not specifically guaranteed by the Constitution may nonetheless form a
 14 ground for federal habeas corpus relief where its impact so infects the entire trial that the
 15 resulting conviction violates the defendant's right to due process." *Hines v. Enomoto*, 658 F.2d
 16 667, 672 (9th Cir. 1981), *abrogated on other grounds* by *Ross v. Oklahoma*, 487 U.S. 81 (1988)
 17 (citing *Quigg v. Crist*, 616 F.2d 1107 (9th Cir. 1980)); *See also Prantil v. California*, 843 F.2d
 18 314, 317 (9th Cir. 1988) The analysis for determining whether a trial is "so infected with
 19 unfairness" as to rise to the level of a due process violation is similar to the analysis used in
 20 determining, under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), whether an error had "a
 21 substantial and injurious effect" on the outcome. *See Polk v. Sandoval*, 503 F.3d 903, 911 (9th
 22 Cir. 2007) (standard applied to habeas petition presenting a jury instruction challenge).

23 **b. Jury Instruction on Burglary**

24 Petitioner claims that his right to due process was violated when "the trial court
 25 erroneously instructed that a burglary did not end until all perpetrators reached a place of
 26 temporary safety, in violation of the felony-murder 'one continuous transaction' test, and failed

1 to instruct on the ‘one continuous transaction’ test that governs killing in the commission of a
 2 felony.” Pet. at 27. As is apparent from the state court’s discussion of this issue, petitioner’s
 3 claim presents essentially a question of state law. *See id.* at 27-33.

4 The California Court of Appeal explained the background to this claim and its disposition
 5 as follows:

6 The felony-murder rule was enacted to protect the public, not to
 7 benefit criminals. (*People v. Chavez* (1951) 37 Cal.2d 656, 669-
 8 670.) For the purpose of the felony-murder rule, a burglary
 9 committed by more than one person continues during the burglars’
 10 escape until all burglars reach a place of temporary safety. (*People*
 11 *v. Bodely* (1995) 32 Cal.App.4th 311, 314 (hereafter *Bodely*);
 12 *People v. Fuller* (1978) 86 Cal.App.3d 618 (hereafter *Fuller*), cited
 in *People v. Cooper* (1991) 53 Cal.3d 1158, 1169.) This rule
 concerning the duration of a burglary is referred to as the “escape
 rule.” “[T]he escape rule serves the legitimate public policy
 considerations of deterrence and culpability’ by extending felony-
 murder liability beyond the technical completion of the crime.
 [Citation.]” (*Bodely, supra*, at pp. 313-314.)

13 Consistent with *Bodely* and *Fuller*, the jury was instructed as
 14 follows: “For the purpose of determining whether an unlawful
 15 killing has occurred during the commission or attempted
 16 commission of burglary, the commission of the crime of burglary
 17 is not confined to a fixed place or a limited period of time. [¶] A
 18 burglary is in progress after the original entry while the perpetrator
 19 is fleeing in an attempt to escape. [¶] A burglary is complete
 20 when all perpetrators have reached a place of temporary safety. [¶]
 21 If a human being is killed by any one of several persons engaged in
 the commission or attempted commission of the crime of burglary,
 all persons who either directly or indirectly or actively commit the
 act constituting that crime, or who with knowledge of the unlawful
 purpose of the perpetrator of the crime, and with intent or purpose
 of committing, encouraging, or facilitating the commission of the
 offense, aid, promote, encourage or instigate by act or advice its
 commission, are guilty of murder of the first degree, whether the
 killing is intentional, unintentional, or accidental.”

22 The defendants assert *Bodely* and *Fuller* were decided incorrectly
 23 because they did not properly take into account whether the
 24 burglary and the killing were part of one continuous transaction.
 Therefore, they urge, the trial court erred in instructing pursuant to
Bodely and *Fuller*. We disagree.

25 “Under the felony-murder rule, ‘the evidence must establish that
 26 the defendant harbored the felonious intent either prior to or during
 the commission of the acts which resulted in the victim’s death . . .

1 .’ [Citation.] First degree felony murder does not require proof of
 2 a strict causal relation between the felony and the homicide, and
 3 the homicide is committed in the perpetration of the felony if the
 4 killing and the felony are parts of one continuous transaction.”
 5 (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1016.) The *Bodely*
 6 court relied on the “one continuous transaction” test when it
 7 approved the “escape rule.” It noted: “Since the application of the
 8 escape rule to burglary is consistent with the ‘one continuous
 9 transaction’ rest, we conclude that felony-murder liability
 10 continues during the escape of a burglar from the scene of the
 11 burglary until the burglar reaches a place of temporary safety.”
 12 (32 Cal.App.4th at p. 314.)

13 In *People v. Eaker* (1980) 100 Cal.App.3d 1007, the court
 14 approved an instruction imposing felony-murder liability if the
 15 burglary and homicide were part of one continuous transaction.
 16 The court held: “If the homicide was committed during an escape
 17 from the burglary, it was a part of one continuous transaction;
 18 therefore, the court properly instructed the jury. (*Id.* at pp. 1011-
 19 1012.)

20 The defendants assert the holding in *Eaker* required a “one
 21 continuous transaction” instruction in this case, instead of an
 22 “escape rule” instruction. “Otherwise,” the defendants contend, “a
 23 burglar who has departed the burglarized structure and is in the
 24 process of escape could be held liable for a separate and
 25 independent killing committed by a co-burglar that was entirely
 26 unrelated to the burglary and/or be held liable for a killing that
 occurred during a new burglary that was not the natural
 consequence of the first burglary.” (Underlining in original.) This
 reasoning fails.

As held by the Supreme Court in *Ainsworth*, “felony murder does
 not require proof of a strict causal relation between the felony and
 the homicide” (45 Cal.3d at p. 1016.) The defendants’
 reasoning, however, seeks to impose a causal relation test. The
 felony-murder rule imposes liability on escaping burglars as a
 matter of public policy. (*People v. Bodely, supra*, at pp. 313-314.)
 Furthermore, the defendants’ apparent concern that they might be
 held liable for an unrelated murder is unfounded because the jury
 was instructed that, to find the defendants guilty of felony murder,
 it had to find the killing occurred “during the commission or
 attempted commission of burglary” If the defendants wanted
 further clarification in this regard, they had the responsibility to
 request it. (*People v. Alvarez* (1996) 14 Cal.4th 155, 222-223.)
 The trial court did not err in instructing the jury using the escape
 rule.

Opinion at 7-10.

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1 This state law question of whether the trial court violated California caselaw when it gave
2 an “escape rule” jury instruction, as opposed to an instruction on “one continuous transaction,” is
3 not cognizable in this federal habeas corpus proceeding. *See Jammal v. Van de Kamp*, 926 F.2d
4 918, 919 (9th Cir. 1991) (“the issue for us, always, is whether the state proceedings satisfied due
5 process; the presence or absence of a state law violation is largely beside the point”). The only
6 question before this court is whether the state court’s decision rejecting petitioner’s jury
7 instruction claim is contrary to or an unreasonable application of the federal due process
8 principles set forth above. 28 U.S.C. § 2254(d). In order to answer this question, the court must
9 determine whether the trial court’s failure to give a jury instruction on “one continuous
10 transaction” rendered petitioner’s trial fundamentally unfair.

11 Under the circumstances of this case, petitioner’s trial was not rendered fundamentally
12 unfair as a result of the jury being instructed on the “escape rule” and not on the “continuous
13 transaction” rule. All of the evidence in this case reflected that the murder of Suter was
14 committed in connection with the burglary of her home or, put another way, was part of the
15 “continuous transaction” constituting that burglary. Specifically, the evidence indicated that
16 Suter’s killing was committed by petitioner or his co-defendant during the escape from Suter’s
17 home after the burglary. There is no evidence that the homicide was unrelated to the burglary of
18 Suter’s residence or that the murder occurred during a “new” burglary, as petitioner argues. For
19 these reasons, petitioner did not suffer prejudice in this case due to the trial court’s failure to
20 specifically inform the jury that petitioner could not be found guilty of felony-murder if the
21 killing was separate from the burglary. Further, as noted by the California Court of Appeal,
22 petitioner’s jury was instructed that, in order to find petitioner guilty of felony-murder, they had
23 to find that the killing occurred during the commission or attempted commission of the burglary
24 of Suter’s home. This instruction would preclude the jury from finding petitioner guilty of
25 felony-murder based on a killing unrelated to the burglary.

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Petitioner has not cited any United States Supreme Court case holding that, for purposes of due process and the felony-murder rule, a jury instruction must inform the jury that a homicide is committed in the perpetration of a felony only if the killing and the felony are part of one continuous transaction. *See Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004) (state court's decision not contrary to federal law where no United States Supreme Court precedent exists). Accordingly, petitioner has failed to demonstrate that the decision of the California Court of Appeal is contrary to or an unreasonable application of United States Supreme Court authority.

For all of these reasons, petitioner is not entitled to relief on this claim.

c. Special Circumstance Instructions

Petitioner's next claim is that the jury instruction on the burglary special circumstance was contrary to federal law and rendered his trial fundamentally unfair. He also claims that the prejudicial effect of the instruction was exacerbated by the prosecutor's closing argument. Pet. at 33. The California Court of Appeal rejected this argument with the following reasoning:

In *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127], the United States Supreme Court concluded the Eighth Amendment does not prohibit the death penalty for a felony murderer who was not the actual killer and who did not intend to kill, but, rather, was a major participant in the underlying felony who harbored a mental state of "reckless indifference to . . . human life." (481 U.S. at pp. 152, 158.) *Tison* defined "major participant" as a defendant who is actively involved in every element of the underlying felony and is physically present during the entire sequence of criminal activity culminating in the murder. (*Id.* at p. 158.) *Tison* defined "reckless indifference to human life" as a subjective appreciation, or knowledge, by the defendant that his acts are likely to result in the taking of innocent life. (*Id.* at pp. 152, 157-158.)

After *Tison*, the Legislature amended Penal Code section 190.2 to add the language from *Tison* concerning special circumstance liability for a co-perpetrator who was not the actual killer. The California Supreme Court, in *Tapia v. Superior Court* (1991) 53 Cal.3d 282, noted that section 190.1, subdivision (d), "brings state law into conformity with *Tison*" (53 Cal.3d at p. 298, fn. 16.)

Consistent with Penal Code section 190.2, the trial court instructed the jury using CALJIC No. 8.80.1, as follows:

1 “The People have the burden of proving the truth of the special
 2 circumstance. [¶] If you have a reasonable doubt as to whether a
 3 special circumstance is true, you must find it to be not true. [¶] If
 4 you find that a defendant was not the actual killer of a human
 5 being, or if you are unable to decide whether the Defendant was
 6 the actual killer or an aider and abettor, you cannot find the special
 7 circumstance to be true as to that Defendant unless you are
 8 satisfied beyond a reasonable doubt that such Defendant, with
 9 reckless indifference to human life, and as a major participant
 10 aided and abetted in the commission of the crime of burglary
 11 which resulted in the death of a human being namely, Jean Suter.
 12 [¶] A Defendant acts with reckless indifference to human life
 13 when that Defendant knows or is aware that his acts involve a
 14 grave risk of death to an innocent human being.”

15 On appeal, the defendants argue that the instruction was
 16 insufficient because, even though it informed the jury that a co-
 17 perpetrator who was not the actual killer could not be held
 18 responsible for felony murder unless he acted with reckless
 19 indifference to human life, the instruction did not prohibit the jury
 20 from finding that a defendant acted with reckless indifference to
 21 human life based solely on the fact that the defendant participated
 22 in the burglary, the underlying felony. They argue the instruction
 23 did not prevent “the jury from making its ‘reckless indifference’
 24 finding in the abstract based on felony murder simpliciter,² i.e.,
 25 defendant’s knowing participation in a felony that resulted in death
 26 and constituted first degree felony-murder.” [Underlining in
 original] They contend that a trial court must instruct “that
 participation in an underlying felony that results in a felony-
 murder death is insufficient for a ‘reckless indifference’ finding
 and that the actual circumstances of the criminal activity must, as a
 natural consequence, carry a grave risk of death.” [Underlining in
 original]. We conclude that the instruction properly conveyed the
 requirement in *Tison* and Penal Code section 190.2, subdivision (d)
 that the non-killer acted with reckless indifference to human life.

19 Contrary to the defendants’ argument, the instruction, as given,
 20 required the jury to determine a non-killer’s mental state – that is,
 21 whether he acted with reckless indifference to human life. In so
 22 instructing, the court did not allow the jury, either expressly or by
 23 implication, to forego its duty of determining the non-killer’s
 24 mental state by presuming the non-killer harbored the required
 25 mental state simply because he engaged in burglary. The jury was
 26 instructed to determine whether the non-killer acted with reckless
 indifference to human life, and we presume the jury followed this
 instruction. (*See People v. Harris* (1994) 9 Cal.4th 407, 425-426.)

² “Simpliciter” in this context means “taken alone.” (Garner, Dict. of Modern Legal Usage (2d ed. 1995) p. 809.)

1 The defendants further argue that the prosecutor led the jury to
2 believe it could find the non-killer acted with reckless indifference
3 to human life simply because he participated in a burglary. This
4 argument is not supported by the record.

5 During closing argument, the prosecutor made the following
6 statements concerning a finding of reckless indifference to human
7 life:

8 “Reckless indifference to human life means that the defendant
9 knows or is aware that his acts involve a grave risk of death to an
10 innocent human being. [¶] How do we know that occurred in this
11 case? It’s [a] pretty simple concept, policy behind this. That is
12 your home is your castle. [¶] You enter someone’s home. Either
13 the person who owns the home could be hurt perhaps while
14 someone is fleeing, perhaps [because] they’re surprised, the
15 perpetrator, and a fight breaks out. [¶] Perhaps because the person
16 inside has a heart attack, or it could be because that person inside
17 has a weapon, that is the homeowner, and shoots the person or
18 stabs or commits some other sort of attack on the person entering
19 their home. [¶] So reckless indifference to human life means you
20 know when you go in there that somebody, and it might be the
21 worst case scenario, but nonetheless if you enter that home
22 somebody could get hurt and die. [¶] Jovan Hall was on the stand.
23 He knows, he knows this. He told you in fact that that was one of
24 the reasons in his lecture to [Adams] for not going in the burglary
25 at all. [¶] He was saying, well, one, it’s trespass, and two,
26 someone could be inside, and somebody might get hurt or injured.
That was his reasoning for telling [Adams] not to go in there in the
first place. [¶] If Mr. Hall knows that, I think it’s clear that Mr.
Adams knows that and Mr. Lewis knows that. It’s reckless. [¶]
You go into somebody’s house at night, all the lights are out. That
is a reckless indifference to human life. [¶] It’s completely
reckless to enter someone’s house. You don’t know if you’re
gonna get shot or somebody’s in there. [¶] They knocked on the
door. They took some precautions, but they entered the house.
But while they’re fleeing even, trying to get away, somebody can
get injured. That’s a special allegation here.”

While the prosecutor discussed the elements of burglary, he tied
those elements to the actual circumstances of this case. He also
discussed facts that were not elements of the burglary but revealed
the non-killer’s state of mind. For example, the plan was
undertaken at night, with knowledge that someone could discover
them, despite their apparent precautions to avoid detection.³
Neither the instructions nor the prosecutor’s argument
misrepresented the requirements of *Tison* and Penal Code section

³ In any event, the trial court instructed the jury to disregard the statements of the
prosecutor to the extent they conflicted with the law as given by the court.

1 190.2, subdivision (d). Accordingly, we conclude the trial court
2 did not err.

3 Opinion at 10-15.

4 *Tison* considered the role that a defendant's intent should play in an Eighth Amendment
5 determination of whether the death penalty is an excessive punishment for a particular defendant.
6 Specifically, *Tison* held that a reckless disregard for someone's life, combined with an intent to
7 engage in conduct that endangers that person's life and ultimately results in his death, is
8 sufficient to permit a sentence of death. Pursuant to Cal. Penal Code § 190.2, a criminal
9 defendant in California can receive a sentence of death or life without the possibility of parole if,
10 among other things, a murder was committed while the defendant was engaged in a first or
11 second degree burglary or the immediate flight therefrom. Cal. Penal Code § 190.2 (17). A
12 person who is not the killer may receive such a sentence if he commits a first or second degree
13 burglary "with reckless indifference to human life." Cal. Penal Code § 190.2 (d).

14 The trial judge's instruction in this case regarding the circumstances under which
15 petitioner could receive a sentence of life without the possibility of parole, which was modeled
16 after the requirements of *Tison*, was not incorrect and did not violated petitioner's right to a fair
17 trial. As explained by the California Court of Appeal, the instruction required the jury to find
18 that petitioner acted with "reckless indifference to human life" when he engaged in the actions
19 leading to Suter's death, defined as a knowledge that his acts involved a grave risk of death to an
20 innocent human being. In his closing argument, the prosecutor specifically noted that the
21 circumstances of the burglary in this case carried a high risk of injury or death. Under these
22 circumstances, there is no likelihood the jury believed that the fact that a burglary was
23 committed, standing alone, was sufficient for a finding of "reckless indifference to human life."
24 On the contrary, by virtue of the special circumstance jury instruction and the prosecutor's
25 closing argument, petitioner's jury was informed that the actual circumstances of the burglary
26 had to carry a grave risk of injury or death to justify a sentence of life without the possibility of

1 parole. This was sufficient to satisfy the requirements of *Tison* and the due process clause.

2 Accordingly, petitioner is not entitled to relief on this claim.

3 **2. Sufficiency of the Evidence**

4 Petitioner's next claim is that the finding as "true" the felony-murder special
5 circumstance allegation should be set aside because there was insufficient evidence he
6 committed the burglary of Suter's apartment with reckless indifference to human life. Pet. at 41.
7 In support of this argument, petitioner notes that the identity of Suter's killer was never
8 conclusively established and that there was evidence he and Adams did not enter the apartment
9 until they had established that it was vacant. *Id.* at 42. He also notes that neither he nor Adams
10 armed themselves with "a deadly weapon, i.e., a gun or knife." *Id.*

11 The California Court of Appeal rejected this claim on the ground that the jury was not
12 required to make a finding of reckless indifference to human life before finding the special
13 circumstance true because there was sufficient evidence that petitioner himself was the killer.
14 The court reasoned as follows:

15 Both defendants assert the evidence was insufficient to establish
16 they acted with reckless indifference to human life and, therefore,
17 the special circumstance finding must be reversed. We must
18 consider this argument separately as to each defendant because,
19 while there was sufficient evidence Lewis was the actual killer,
20 there was no evidence Adams was the actual killer.

19 As Lewis acknowledges, the requirement of finding reckless
20 indifference to human life before finding true a burglary special
21 circumstance does not apply if there was sufficient evidence for
22 the jury to conclude that the defendant was the actual killer. (See
23 Pen. Code, § 190.2 [requiring reckless indifference only if
24 defendant not actual killer]; see also *People v. Smithey* (1999) 20
25 Cal.4th 936, 1016 [same].) Since we conclude there was sufficient
26 evidence for the jury to conclude that Lewis was the actual killer,
we need not consider his reckless indifference argument.

Lewis admittedly encountered Suter as he was exiting the
apartment. He asserted he merely bumped her, but the evidence,
including his proximity to her, her injuries, and the likelihood that
the injuries were caused by the flashlight he was carrying, support
the inference he beat her, striking her at least four times with
considerable force. Additionally, he criticized Adams for leaving

1 him at the apartment and stated he had hit Suter “upside the head.”

2 Opinion at 18-19. The question before this court is whether the state court’s conclusion that
3 sufficient evidence supported a finding that petitioner killed Suter is contrary to or an
4 unreasonable application of United States Supreme Court law.

5 There is sufficient evidence to support a conviction if, “after viewing the evidence in the
6 light most favorable to the prosecution, any rational trier of fact could have found the essential
7 elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319
8 (1979); *see also Juan H. v. Allen*, 408 F.3d 1262, 1274, 1275 & n.13 (9th Cir. 2005). Viewing
9 the evidence in the light most favorable to the verdict, and for the reasons expressed by the state
10 appellate court, there was sufficient evidence from which a reasonable trier of fact could have
11 found beyond a reasonable doubt that petitioner fatally injured Suter with his flashlight when he
12 encountered her after he burgled her apartment. Accordingly, the conclusion of the state court
13 that sufficient evidence supported the jury’s true finding on the burglary special circumstance is
14 not contrary to federal law and may not be set aside.

15 Even if a finding of reckless indifference was required in order to support petitioner’s
16 sentence of life without the possibility of parole, this court concludes that the evidence was
17 sufficient for such a finding. As stated by the California Court of Appeal in connection with its
18 decision on this claim regarding petitioner’s co-defendant Adams:

19 Adams went to the Stonecreek Apartments intending to commit a
20 burglary. Just days earlier, he had committed a violent entry into
21 an apartment, assaulting the occupant and demanding money. This
22 time, he went with intent to commit a crime in the dark. He claims
23 he made sure there was no one inside before entering; however, the
24 jury was not bound by his claim. Indeed, a burglar can never be
25 certain no one is in a home into which he enters. Here, there was
26 evidence entry was made through the window and the apartment,
fortuitously being temporarily empty, was searched for valuables.
Adams knew the occupant could return at any time. His history
shows he was willing to use force to complete his crimes.
Committing the crime in concert with Lewis made it easier to use
violence to accomplish their goal by overpowering the occupant.

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Residential burglary, especially under the specific circumstances of this case, including a nighttime entry during a power outage, poses a serious risk to innocent human beings. (citation omitted.) In the dark, a victim is more likely to happen upon the criminal unexpectedly, exactly as happened here. Furthermore, violence is more likely to take place with the combination of surprise and close proximity. This violence, intensified by the criminal's desire to complete the crime and escape and by the victim's natural impulse to protect life, limb, and abode, poses a grave risk of death to an innocent human being. Adams's was not a harmless prank gone awry; it was an inherently and specifically dangerous crime exhibiting reckless indifference to human life. The evidence was sufficient to sustain the special circumstance finding.

Opinion at 19-20. These arguments are equally applicable to petitioner's actions on the night of the killing.

In sum, the evidence in this case was sufficient to support the jury's true finding on the special circumstance allegation. Accordingly, petitioner is not entitled to relief on this claim.

3. Prosecutor's Use of Peremptory Challenges

Petitioner, who is African-American, claims that his conviction must be reversed because the prosecutor exercised peremptory challenges to strike two black female jurors on the basis of race, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

a. Background

The state court record reflects that there were four African-American prospective jurors in the pool of 100 persons summoned for petitioner's trial. Augmented Reporter's Transcript on Appeal (ART) at 7-15, 143. The prosecution and defense each had thirty-five peremptory challenges that they could exercise, plus several more for alternate jurors. *Id.* at 5. At the beginning of voir dire, the trial court randomly called 18 of the 100 jurors into the jury box for voir dire. *Id.* at 15. Of these 18 jurors, only Sallie T. was African-American. *Id.* at 7-15, 143. During voir dire, the following colloquy occurred between the trial judge and Sallie T:

Q. Okay. Have we covered everybody's relatives or friends or someone very close to you who has been in trouble with the law in this area?

Yes, Ms. T[]?

1 A. Oh, I have numerous people in jail in my family.

2 Q. In jail?

3 A. For armed robbery, muggings.

4 Q. Okay. These are people, brothers?

5 A. Cousins.

6 Q. Cousins?

7 A. Cousin, yeah.

8 Q. Let me ask you, Ms. T[]. This is all in the Sacramento County
9 area?

10 A. Yes.

11 Q. And was there ever any feeling that you had during these
12 circumstances, that your cousins or family members were being
13 unfairly treated by the authorities in any way?

14 A. No.

15 Q. And do you think because your family members have been in
16 trouble with the law, that it's going to affect your ability to be fair
17 in this case in any way?

18 A. No.

19 *Id.* at 30-31.

20 The prosecutor used his third peremptory challenge to exclude Sallie T from the jury. *Id.*
21 at 92-93. At this point, defense counsel made a joint challenge to the prosecutor's challenge to
22 Sallie T. pursuant to *People v. Wheeler*, 22 Cal.3d 258 (1978).⁴ *Id.* at 93, 104. The trial court
23 denied the challenge, ruling as follows:

24 ///

25 ⁴ In *Wheeler*, the California Supreme Court held that peremptory challenges may not be
26 used to exclude from a jury all or most members of a cognizable group solely on the ground of
presumed "group bias." *Wheeler* is "the California counterpart to *Batson*." *Yee v. Duncan*, 463
F.3d 893, 896 (9th Cir. 2006). Although petitioner made his motion pursuant to *Wheeler*, the
standards set forth in *Batson* control this court's disposition of this case. *Kesser v. Cambra*, 465
F.3d 351, 353 (9th Cir. 2006); *Lewis v. Lewis*, 321 F.3d 824, 827 & n. 5 (9th Cir. 2003).

1 THE COURT: All right. On the record outside the presence of the
2 jury. Mr. Holmes, you wanted to put on the record –

3 MR. HOLMES (counsel for petitioner's co-defendant Adams):
4 Yes, Your Honor, the prosecution excused a Ms. T[], I forgot what
5 seat she's in, I think seat –

6 THE COURT: Seven or eight.

7 MR. HOLMES: – Eight, and we would like to lodge a *Wheeler*
8 objection on that at this time.

9 THE COURT: The Court heard the objection at side bar, is
10 satisfied a prima facie case has not been made, so I will deny the
11 motion at this time.

12 *Id.* at 104.⁵

13 Veronica M. was the second black prospective juror to be called into the jury box for voir
14 dire. *Id.* at 97, 143. During voir dire, Veronica M. stated that her brother worked for the
15 Department of Corrections, she had lived in Sacramento for “20 plus years,” she was employed
16 with the California Department of Disability Adult Program Services, and she thought she could
17 be a fair juror. *Id.* at 97, 101. The prosecution used its eleventh peremptory challenge to remove
18 Veronica M. *Id.* at 93, 118. At that point, the defense made another *Wheeler* challenge. *Id.* at
19 118.⁶ Outside the presence of the jury, the following discussion occurred relative to that
20 challenge:

21 THE COURT: All right. And then with the challenge to Ms. M[],
22 juror number ten, and the previous challenge to Ms. T[], juror
23 number eight, both of whom were black, the Court has entertained
24 at side bar a *Wheeler* motion by the defense, joined in by all sides.
25 The Court is still not satisfied based upon its determinations here
26 of the questionnaires and the like that there have been a *Wheeler*
violation or a prima facie case shown at this time.

23 ⁵ The record reflects that immediately after the prosecutor excused Sallie T., all defense
24 counsel asked permission to approach the bench, at which time an unreported discussion
25 occurred. *Id.* at 93. The *Wheeler* objection was apparently discussed during that unreported
26 sidebar conference.

⁶ This second *Wheeler* challenge was also discussed during an unreported sidebar
conference. *Id.*

1 So I'm going to not require the district attorney to state his
2 reasons.

3 MR. PETERS: Your Honor, could I be heard on that?

4 THE COURT: You certainly may, Mr. Peters.

5 MR. PETERS: Your Honor, I'd like to state that I believe we had
6 a hundred people on the panel. I think there were four Blacks to
7 start. I'm not positive, but that's what I counted.

8 THE COURT: That's what I counted.

9 MR. PETERS: And he has excused two of the four. And whether
10 or not the other ones will come up, I don't know, because of the
11 amount of challenges that we've had to use here, the defense
12 challenges. So, I mean, Miss Wilson has advised me that we've
13 used our 20.

14 THE COURT: I have you having used 20, right.

15 MR. PETERS: So it seems to me that I think some showing
16 should be required of Mr. Sawtelle at this point because of the fact
17 that there's such a low number of Blacks on the panel that we
18 have, and he has excused two of them so far.

19 And I think one of them, that last one had a good friend in the
20 CDC or something as I recall, but I just wanted to state that.

21 THE COURT: I don't think that was his reason.

22 MR. PETERS: I don't know what his reason was.

23 THE COURT: Well, looking at the questionnaire I can discern
24 one.

25 MR. MASUDA (counsel for co-defendant Hall): Well, your
26 Honor –

THE COURT: I'm not sure whether I should state that for the
record what I discern.

MR. MASUDA: What I saw –

THE COURT: I think you have to have a prima facie case of bias
before I require him to enunciate his, and I don't think I have to
enunciate it for him.

MR. MASUDA: Well, all I'm saying with respect to the
questionnaire, I saw on there where she had sat on previous jury
duty, and the indication was that they did not reach a verdict.

1 THE COURT: Right.

2 MR. MASUDA: But that's also true with Mr. Medina who the
3 district attorney did pass on.

4 THE COURT: I'm not sure what his ultimate choice was.

5 MR. MASUDA: That's the only thing I could see on the
6 questionnaire where I would think the person would knock off –

7 THE COURT: Mr. Medina was a minority as well, but Hispanic.

8 MR. MASUDA: But Hispanic, I think a big difference here since
9 we have three young Black men. But I know he did pass on the
10 panel when Mr. Medina was in the, was in the box.

11 And Mr. Medina has a questionnaire filled out that he sat on a
12 criminal case in 1990 or '88, and they were not able to reach a
13 verdict.

14 So I think that in itself with the questionnaire, and the fact that two
15 out of the three [sic] prospective jurors, Black jurors have been
16 excused by district attorney would be a sufficient showing.

17 THE COURT: I'm going to deny the motion at this time.

18 *Id.* at 142-45.

19 **b. State Court Decision**

20 On direct appeal, petitioner argued that his constitutional rights were violated by the
21 prosecutor's improper use of peremptory challenges to exclude Sallie T. and Veronica M. from
22 the jury. The California Court of Appeal denied this claim with the following reasoning:

23 Lewis and Adams are African-American, as were four of the 100
24 prospective jurors in the jury panel. During the jury selection
25 process, the prosecution used two of its peremptory challenges to
26 excuse two African-American women. The defendants objected
each time, based on *People v. Wheeler*, (1978) 22 Cal.3d 258. The
trial court, however, found there was no prima facie showing of
group bias and overruled the defendants' objections without
requiring the prosecutor to state reasons for exercising the
peremptory challenges.⁷

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⁷ The record does not reflect whether the two remaining African-American prospective jurors eventually served on the jury.

1 The defendants assert the trial court erred in finding they had not
 2 made a prima facie showing that the prosecution violated their
 3 constitutional rights under *People v. Wheeler, supra*, 22 Cal.3d
 4 258 and *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69].
 5 They contend the trial court applied the wrong legal standard in
 6 determining whether a prima facie showing had been made and
 7 improperly found such showing had not been made. These
 8 contentions are without merit.

9 “‘It is well settled that the use of peremptory challenges to remove
 10 prospective jurors solely on the basis of a presumed group bias
 11 based on membership in a racial group violates both the state and
 12 federal Constitution.’ [Citations.] Under *Wheeler* and *Batson*,
 13 “‘[i]f a party believes his opponent is using his peremptory
 14 challenges to strike jurors on the ground of group bias alone, he
 15 must raise the point in timely fashion and make a prima facie case
 16 of such discrimination to the satisfaction of the court. First, . . . he
 17 should make as complete a record of the circumstances as is
 18 feasible. Second, he must establish that the persons excluded are
 19 members of a cognizable group within the meaning of the
 20 representative cross-section rule. Third, from all the circumstances
 21 of the case he must show a strong likelihood [or reasonable
 22 inference] that such persons are being challenged because of their
 23 group association” [Citations.]” (*People v. Box* (2000) 23
 24 Cal.4th 1153, 1187-1188.)

25 The California Supreme Court has declared, in *People v. Box*,
 26 *supra*, 23 Cal.4th at pg. 1188, footnote 7, that, in order to
 determine whether there is a prima facie showing of group bias
 under *People v. Wheeler, supra*, 22 Cal.3d 258, the court must
 determine whether a *reasonable inference* arises that peremptory
 challenges are being used on the ground of group bias. This
 declaration resolved a split in Court of Appeal decisions. In
People v. Fuller (1982) 136 Cal.App.3d 403, Division One of the
 Fourth Appellate District, presaging *Box*, decided that the proper
 standard was whether there arose a *reasonable inference* of group
 bias. In *People v. Bernard* (1994) 27 Cal.App.4th 458, however,
 Division One of the Fourth Appellate District disagreed with
Fuller and held that the proper standard was whether a *strong*
likelihood of group bias had been shown.

There is no indication in the record concerning which standard the
 trial court used in concluding there was no prima facie showing of
 group bias. Because *Box* was decided after the trial in this case,
 the defendants assert the trial court was bound, under stare decisis,
 by *Bernard* and therefore applied the improper standard. To the
 contrary, stare decisis did not bind the trial court to apply the
 improper *Bernard* standard. When opinions of the Court of
 Appeal conflict, the trial court must apply its own wisdom to the
 matter and choose between the opinions. (*McCallum v. McCallum*
 (1987) 190 Cal.App.3d 308, 315, fn. 4.) “As a practical matter, a

1 superior court ordinarily will follow an appellate opinion
2 emanating from its own district even though it is not bound to do
3 so. Superior courts in other appellate districts may pick and
4 choose between conflicting lines of authority. This dilemma will
5 endure until the Supreme Court resolves the conflict, or the
6 Legislature clears up the uncertainty by legislation.” (*Ibid.*)

7 Because the trial court was not bound by *Bernard* and there is no
8 indication that the court applied the improper standard, we will not
9 presume so. Instead, we presume correctness. (*See* Evid. Code,
10 664 [presuming official duty performed].) An appellant bears the
11 burden of affirmatively showing error on appeal. (*See People v.*
12 *Coley* (1997) 52 Cal.App.4th 964, 972.) The defendants have not
13 done so here.

14 The defendants also assert the trial court erred in finding that no
15 reasonable inference of bias existed. “When a trial court denies a
16 *Wheeler* motion because it finds no prima facie case of group bias
17 was established, the reviewing court considers the entire record of
18 voir dire.’ [Citation.] ‘If the record “suggests grounds upon which
19 the prosecutor might reasonably have challenged” the jurors in
20 question, we affirm.” (*People v. Box, supra*, 23 Cal.4th at p.
21 1188.) Contrary to the defendants’ suggestion, the prosecutor had
22 reasonable grounds to challenge the African-American prospective
23 jurors.

24 During general questioning of the prospective jurors concerning
25 whether a family member had been charged with a crime, Sallie T.,
26 one of the African-American prospective jurors, responded: “Oh, I
have numerous people in jail in my family.” She further explained
her cousins were incarcerated for armed robbery and muggings in
Sacramento County. While she asserted she would not be biased
as a result of her family situation, the fact she had family members
incarcerated for crimes in Sacramento County was a ground for a
reasonable challenge by the prosecutor because it was evidence
that she could be biased against the prosecution. (*See People v.*
Douglas (1995) 36 Cal.App.4th 1681, 1689 [finding reasonable
use of peremptory challenge when family members of prospective
juror had criminal records].)

Veronica M., another African-American prospective juror, had
previously served on a jury that did not reach a verdict. She was a
long-time Sacramento resident, who works for the state and has a
brother who is an employee of the Department of Corrections. She
also felt she could be a fair juror; however, the prosecution was
justified in challenging her because of the inference that she might
have been the cause of the prior hung jury and could do the same
in this trial. (*See People v. Rodriguez*, (1999) 76 Cal.App.4th
1093, 1114 [finding reasonable use of peremptory challenge when
prospective juror served on prior hung jury].)

Defendants protest that the prosecutor did not challenge another prospective juror who had previously been a juror in a case in which the jury did not reach a verdict. The *Box* court responded to a similar contention as follows: “Defendant argues, however, that these and the other bases stated by the prosecutor are insufficient because the prosecutor did not excuse other non-Black jurors who displayed similar characteristics. ‘However, we have previously rejected a procedure that places an “undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor,” noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial.’ [Citations.] ‘In addition, we have observed that “the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge.”’ [Citation.] ‘Moreover, “the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror [who] on paper appears to be substantially similar.”’ [Citation.]” (*People v. Box, supra*, 23 Cal.4th at p. 1190.)

Additionally, the defendants claim the prosecutor’s challenges were suspect because he exercised them against African-American *women*. The analysis is the same, however. There were grounds for a reasonable challenge.

The trial judge, having participated in the jury selection process, was in the best position to determine under all the relevant circumstances whether there was a reasonable inference the African-American prospective jurors were challenged because of their group association. (*See People v. Box, supra*, 23 Cal.4th at p. 1189.) Because there were grounds for reasonable challenges against the African-American prospective jurors, we conclude there was no error.

Opinion at 21-26.

c. Prior Proceedings in this Court

By order dated November 4, 2008, this court determined that a de novo standard of review, and not the AEDPA deferential standard, must be employed when deciding petitioner’s *Batson/Wheeler* claim. *See* November 4, 2008, Order at 10-13. The court also determined that petitioner had demonstrated a prima facie case under *Batson* with respect to the prosecutor’s exercise of a peremptory challenge against jurors Sallie T. and Veronica M. such that the

1 challenge must be explained and the explanation evaluated for pretext. *Id.* at 13-19.

2 Accordingly, an evidentiary hearing was held on February 2, 2009, to afford the prosecutor the
 3 opportunity to explain his reasons for excluding Sallie T. and Veronica M. from petitioner's jury.
 4 Subsequent to that evidentiary hearing, on February 26, 2009, petitioner filed an "Amended Post
 5 Evidentiary Hearing Brief" (Petitioner's Brief), and Exhibits A, A-1, and B. On March 10,
 6 2009, respondent filed a "Post-Evidentiary Hearing Brief" (Respondent's Brief). On March 16,
 7 2009, petitioner filed a "Reply/Response to Respondent's Brief" (Petitioner's Reply), and
 8 Exhibits A-D. This court has considered those briefs and exhibits in issuing these findings and
 9 recommendations.

10 **d. Legal Standards Regarding Petitioner's Batson/Wheeler Claim**

11 Purposeful discrimination on the basis of race or gender in the exercise of peremptory
 12 challenges violates the Equal Protection Clause of the United States Constitution. *See Batson*,
 13 476 U.S. at 79; *Johnson v. California*, 545 U.S. 162 (2005). So-called *Batson* claims are
 14 evaluated pursuant to a three-step test:

15 First, the movant must make a prima facie showing that the
 16 prosecution has engaged in the discriminatory use of a peremptory
 17 challenge by demonstrating that the circumstances raise "an
 18 inference that the prosecutor used [the challenge] to exclude
 19 veniremen from the petit jury on account of their race." [Citation
 20 omitted.] Second, if the trial court determines a prima facie case
 21 has been established, the burden shifts to the prosecution to
 22 articulate a [gender]-neutral explanation for challenging the juror
 23 in question. [Citation omitted.] Third, if the prosecution provides
 24 such an explanation, the trial court must then rule whether the
 25 movant has carried his or her burden of proving the existence of
 26 purposeful discrimination.

22 *Tolbert v. Page*, 182 F.3d 677, 680 (9th Cir. 1999) (en banc).

23 In order to establish a prima facie case of racial discrimination, petitioner must show that
 24 "(1) the prospective juror is a member of a "cognizable racial group," (2) the prosecutor used a
 25 peremptory strike to remove the juror, and (3) the totality of the circumstances raises an
 26 inference that the strike was motivated by race." *Boyd v. Newland*, 467 F.3d 1139, 1143 (9th Cir.

2006) (citing *Batson*, 476 U.S. at 96 and *Cooperwood v. Cambra*, 245 F.3d 1042, 1045-46 (9th Cir. 2001)). A prima facie case of discrimination “can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives ‘rise to an inference of discriminatory purpose.’” *Johnson*, 545 U.S. at 169 (quoting *Batson*, 476 U.S. at 94.) In evaluating whether a defendant has established a prima facie case, a reviewing court should consider the “‘totality of the relevant facts’ and ‘all relevant circumstances’ surrounding the peremptory strike.” *Boyd*, 467 F.3d at 1146 (quoting *Batson*, 476 U.S. at 94, 96). This should include a review of the entire transcript of jury voir dire in order to conduct a comparative analysis of the jurors who were stricken and the jurors who were allowed to remain. *Boyd*, 467 F.3d at 1050 (“We believe, however, that Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case”). *See also Miller-El v. Dretke*, 545 U.S. 231 (2005) (utilizing comparative analysis, in a case in which a prima facie showing had been made, to determine whether the prosecutor had been motivated by racial bias in exercising peremptory challenges).⁸

At the second step of the *Batson* analysis, “‘the issue is the facial validity of the prosecutor’s explanation.” *Hernandez v. New York*, 500 U.S. 352, 360 (1991). “A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror.” *Id.* at 360. “Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race-neutral.” *Stubbs v. Gomez*, 189 F.3d 1099, 1105 (9th Cir. 1999) (quoting *Hernandez*, 500 U.S. at 360). For purposes of step two, the prosecutor’s explanation need not be “persuasive, or even plausible.” *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Indeed, “to accept a prosecutor’s stated nonracial reasons, the court

⁸ Comparative juror analysis refers to “an examination of a prosecutor’s questions to prospective jurors and the jurors’ responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group.” *Boyd*, 467 F.3d at 1145. *See also Miller-El*, 125 S.Ct. at 2325 (stating that “side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve” was “more powerful” than bare statistics).

1 need not agree with them.” *Kesser*, 465 F.3d at 351. “It is not until the *third* step that the
2 persuasiveness of the justification becomes relevant--the step in which the trial court determines
3 whether the opponent of the strike has carried his burden of proving purposeful discrimination.”
4 *Purkett*, 514 U.S. at 768 (emphasis in original). The question is whether, after an evaluation of
5 the record pertaining to that particular case, the prosecutor’s race-neutral explanation for a
6 peremptory challenge should be believed. *Id.*

7 In the third step of a *Batson* challenge, the trial court has “the duty to determine whether
8 the defendant has established purposeful discrimination,” *Batson*, 476 U.S. at 98, and, to that
9 end, must evaluate the “persuasiveness” of the prosecutor’s proffered reasons. *See Purkett*, 514
10 U.S. at 768. In determining whether petitioner has carried this burden, the Supreme Court has
11 stated that “a court must undertake ‘a sensitive inquiry into such circumstantial and direct
12 evidence of intent as may be available.’” *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v.*
13 *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Hernandez*, 500 U.S. at 363.
14 (“[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for
15 purposeful discrimination.” *Purkett*, 514 U.S. at 768). *See also Lewis v. Lewis*, 321 F.3d at 830
16 (“[I]f a review of the record undermines the prosecutor’s stated reasons, or many of the proffered
17 reasons, the reasons may be deemed a pretext for racial discrimination.”) In step three, the court
18 “considers all the evidence to determine whether the actual reason for the strike violated the
19 defendant’s equal protection rights.” *Yee v. Duncan*, 463 F.3d 893, 899 (9th Cir. 2006). A
20 reviewing court must evaluate the “totality of the relevant facts” to decide ‘whether counsel’s
21 race-neutral explanation for a peremptory challenge should be believed.’” *Ali v. Hickman*, ____
22 F.3d ____, 2009 WL 3401452, at *5 (9th Cir. (Cal.)). “A court need not find all nonracial reasons
23 pretextual in order to find racial discrimination.” *Kesser*, 465 F.3d at 360.

24 The defendant bears the burden of persuasion to prove the existence of unlawful
25 discrimination. *Batson*, 476 U.S. at 93. “This burden of persuasion ‘rests with, and never shifts
26 from, the opponent of the strike.’” *Id.* at 2417 (quoting *Purkett*, 514 U.S. at 768). However, “the

1 defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory
 2 challenges constitute a jury selection practice that permits ‘those to discriminate who are of a
 3 mind to discriminate.’” *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562
 4 (1953)).

5 **e. Analysis**

6 **I. Prima Facie Case of Racial Discrimination**

7 In the order setting the evidentiary hearing in this matter, this court noted that the state
 8 court record did not reflect whether petitioner’s jury contained any African-American members.
 9 November 4, 2008, Order at 5.⁹ In his brief, respondent informs the court that petitioner’s jury
 10 did, in fact, contain a female African-American juror. Respondent’s Brief at 1, 2. In support,
 11 respondent cites: (1) the testimony of the prosecutor at the evidentiary hearing to the effect that
 12 he recalled petitioner’s jury contained a female African-American juror, and that he remembered
 13 this because the juror complained to the trial judge during trial that petitioner was staring at her
 14 and it made her feel uncomfortable, Reporter’s Transcript of Evidentiary Hearing (RTEH) at 8-9,
 15 26-27; (2) a portion of the transcript of petitioner’s trial, during which a juror explained to the
 16 trial judge in a hearing outside the presence of the other jurors that petitioner was staring at her
 17 during the testimony of a witness and it made her feel uncomfortable, Reporter’s Transcript of
 18 petitioner’s trial (RT) at 2363-66; and (3) a portion of the transcript of jury voir dire, during
 19 which counsel for co-defendant Hall stated that “two out of the three prospective jurors, Black
 20 jurors have been excused by district attorney,” ART at 145. *Id.* at 2. Respondent argues that,
 21 because petitioner’s jury contained one African-American member, the prosecutor’s peremptory
 22 challenges resulted in the exclusion of only 67% of the eligible African-American prospective
 23 jurors, and not 100% of those jurors. *Id.* In light of this new information regarding the presence
 24 of a black juror on petitioner’s jury, respondent “asks this Court to reconsider its previous

25 ⁹ The California Court of Appeal also noted that the record did not reflect whether any
 26 African-American jurors served on petitioner’s jury. Opinion at 21 n.7.

1 finding of a prima facie case under *Batson*.” *Id.*¹⁰

2 The request to reconsider the previous finding of a prima facie case is denied. For the
3 reasons previously explained by the court in the November 4, 2008, Order, the circumstances
4 regarding the peremptory challenges to jurors Sallie T. and Veronica M. warranted an
5 explanation to dispel any inference of discrimination, and the trial court’s refusal to require an
6 explanation was contrary to controlling Supreme Court authority. The fact that the prosecutor
7 later accepted the jury with one sitting African-American juror does not dictate a different result
8 on this issue. The court did not base its ruling on the assumption that there were no black jurors
9 on petitioner’s jury. For the reasons described in this court’s previous order, the circumstances
10 at the time of petitioner’s objection to the challenge of two African-American jurors gave rise to
11 an inference of discriminatory purpose, establishing a prima facie case which warranted a non-
12 discriminatory explanation.

13 **ii. Steps Two and Three of Baston Analysis**

14 Petitioner claims that the prosecutor’s reasons for striking Sallie T. and Veronica M.,
15 which he described at the February 2, 2009 evidentiary hearing, were a pretext for racial
16 discrimination. Accordingly, this court will evaluate the record to determine whether the
17 prosecutor’s stated reasons for excluding Sallie T. and Veronica M. from petitioner’s jury pass
18 constitutional muster.

19 ///

20 ///

21 ///

22 ///

23
24 ¹⁰ Respondent notes that in the order setting the evidentiary hearing, the court stated that
25 “no other circumstances rebut the inference of discrimination arising from the prosecutor’s strike
26 of the only two African-American jurors in the initial jury pool.” November 4, 2008, order at 17.
However, another portion of the order setting the evidentiary hearing clarifies that the court was
referring here to “the initial pool of 25 jurors who had been called for voir dire” and not to the
entire jury pool. *See id.* at 15, 16.

1 (a) Sallie T.

2 At the evidentiary hearing, the prosecutor explained that he exercised a peremptory
3 challenge against Sallie T. because:

4 She was – her background. She was a bit of a wreck. I mean her –
5 a lot of family and – either incarcerated in County Jail or convicted
of various crimes.

6 RTEH at 9. He stated that those factors “made her absolutely unfit to sit on the jury.” *Id.* When
7 questioned by petitioner’s counsel, the prosecutor stated, “I figured that a prosecutor probably
8 prosecuted him, so there’s a tendency, I think, among people, to not be as wild about the D.A.’s
9 office, or the prosecutor if their own family has been convicted.” *Id.* at 29. He also explained
10 that “early on in the (voir dire) proceedings, I’m likely to use my challenges a little more
11 readily.” *Id.* at 39.

12 The second step of the *Batson/Wheeler* analysis is concerned with the “facial validity of
13 the prosecutor’s explanation.” *Hernandez*, 500 U.S. at 360. The court concludes that the
14 prosecutor’s stated reason for exercising a peremptory challenge against juror Sallie T. – the fact
15 that a number of her cousins had been prosecuted and were incarcerated in Sacramento County –
16 was facially race-neutral. His reasons were not based on the race of Sallie T. and there was no
17 discriminatory intent inherent in his explanation. *Id.* This court must therefore employ the third
18 step of the *Batson* analysis to determine whether the prosecutor’s race-neutral explanations were
19 sincere or whether they were a pretext for purposeful racial discrimination. *Kesser*, 465 F.3d at
20 359.

21 In *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203, 1208, 1213 (2008), the Supreme
22 Court stated that the third *Batson* step “involves an evaluation of the prosecutor’s credibility,”
23 and that “the best evidence of discriminatory intent often will be the demeanor of the attorney
24 who exercises the challenge.” *Id.* at 1208, 1213 (internal quotation marks and citation omitted).
25 See also *Hernandez*, 500 U.S. at 365 (“the best evidence [of discriminatory intent] often will be
26 the demeanor of the attorney who exercises the challenge”); *Lewis v. Lewis*, 321 F.3d at 830

1 (quoting *McClain v. Prunty*, 217 F.3d 1209, 1220 (9th Cir. 2000)) (“[a] finding of discriminatory
2 intent turns largely on the court’s evaluation of the prosecutor’s credibility”). During the
3 evidentiary hearing, this court was able to evaluate the prosecutor’s demeanor while he was
4 explaining his strikes of Sallie T and Veronica M. Specifically, the court was able to evaluate
5 “whether the prosecutor’s demeanor belies a discriminatory intent.” *Snyder*, 128 S.Ct. at 1208.
6 The undersigned finds the prosecutor to be a very credible witness. There was no evidence in his
7 demeanor or any other evidence presented that his non-discriminatory explanation lacked
8 credence. In light of those credible, race-neutral explanations, the court finds that the strikes of
9 Sallie T. or Veronica M. were not for discriminatory reasons.¹¹

10 Another relevant circumstance in determining whether a prosecutor excused a juror with
11 discriminatory intent is a comparative juror analysis. *Boyd*, 467 F.3d at 1145. *See also Kesser*,
12 465 F.3d at 360 (the “totality of the relevant facts” includes “the characteristics of people [the
13 prosecutor] did not challenge”). Petitioner points out that alternate jurors 1 and 2 also had
14 relatives who had been convicted of crimes and sentenced to prison. Specifically, the brother-in-
15 law of alternate juror 1 went to prison in Arizona for assault with a deadly weapon 17 years prior
16 to petitioner’s trial. Petitioner’s Exhibit A-1 at 000063. The brother-in-law of alternate juror 3
17 was killed by his wife. *Id.* at 000077. The wife was subsequently convicted of this murder. *Id.*
18 at 000078. Like Sallie T., both of these jurors stated that these circumstances would not impact
19 their ability to be fair. *Id.* at 000063, 78. In addition, similar to Sallie T., alternate jurors 1 and 3
20 were established members of the community with nothing else on their questionnaires to
21 disqualify them from serving on petitioner’s jury. However, the prosecutor did not excuse these
22 jurors.

23
24 ¹¹ Although the undersigned did not observe the jury selection process first-hand and was
25 not able to see the jurors and potential jurors, the prosecutor’s stated reasons for excluding Sallie
26 T. and Veronica M. did not involve their demeanor. Therefore, it was less important for this
court to view the jurors themselves. *Cf. Snyder*, 552 U.S. at ___, 128 S.Ct. at 1208-09 (where
the prosecutor’s reasons for excluding an African-American juror were based, in part, on the
juror’s nervous demeanor, the trial court’s first-hand evaluation of the juror was critical).

1 When asked about alternate juror 1, the prosecutor explained:

2 Q. Alternate No. 1 is a fellow by the –

3 A. Yes.

4 Q. – name of Pacheco. What is it you liked about him?

5 (Pause – reviewing exhibit.)

6 A. This questionnaire, he looks like a great juror, but I see that he
7 mentions in the – during the voir dire is it –

8 Q. Brother-in-law is in –

9 A. His brother-in-law in state prison.

10 Q – state prison for assault with a deadly weapon. Correct?

11 A. Yeah. I don't generally like that, at least – and I don't know,
12 you know, what the – but I guess I would be – since we're sitting
on the main jury, you know, you only have a number of times you
can kick people.

13 As alternatives, it's very different than obviously what I had,
14 almost 35 or 40 challenges in the group. So I had to be more
careful.

15 This person would not have made it through in my main 12, and I
16 guess I'm faced with the same situation that any defense lawyer is
too, is that alternate jurors, they do sometimes end up on the jury,
17 and you hope that they don't, but you – it's not possible to take the
same – to use the same criteria with alternates, because you don't
18 have as many challenges, and you just – and you don't – and you
can also look to see, to a degree, you can generally – there's
usually a few people there you can see who's coming up next.
19 And what you hope is that if they end up on the jury, that the judge
uses a random selection for the alternates, instead of in order.

20 Q. But is it fair to say, and I could be wrong, but I haven't found
21 anyplace in the record where you exercised any peremptory
challenges with respect to alternates; correct?

22 A. Yeah. I don't see that either.

23 Q. And you did have peremptory challenges; correct? Probably
24 five, minimum of three?

25 A. Yeah, I would think three, but you're right, it could have been
26 as many as five.

1 Q. Because defense would have had three plus joint two perhaps?
2 I don't know. I'm making it up as I go along. But we agree that
3 you would have had at least a minimum of three?

4 A. I would have had at least three. I would have had at least three.
5 But this is – you know, that's the part where you say, you know,
6 towards the end of a jury, and you start to look, and you have –

7 Q. Sure.

8 A. You're looking out in the audience, and if you don't like
9 what's coming, you sometimes have to just take what you have
10 and hope that the [sic] don't end up on the jury.

11 RTEH at 52-53.

12 When the prosecutor was asked about alternate juror 3, the following colloquy occurred:

13 Q. Why did you like her?

14 (Pause – reviewing exhibit.)_

15 Q. The transcripts are behind the tab.

16 A. Yeah. I'm just kind of reviewing it, just trying to figure out
17 what it was saying here.

18 (Pause – reviewing exhibit.)

19 A. I can tell you I don't have any independent recollection. I can
20 see things as to why I would have, but –

21 Q. You can see things what?

22 A. I can see things in here as to – you know, that I would consider
23 okay, and I can see a couple of things in here that would concern
24 me, so –

25 Q. Yeah. The fact that her brother-in-law was killed by his wife;
26 correct?

A. Yeah. I don't know – I'd like to know information – as I look
at that right now, I'd like to know more information about that if I
were going to choose this person as a juror now. I don't know
what the details were.

Id. at 51.

The prosecutor testified that he does not “look at alternate jurors the same as I do my
main group.” *Id.* at 45. First, he had fewer peremptory challenges with respect to the alternates.

1 Second, the prosecutor explained that the selection of alternates comes at the end of the jury
2 selection process, and “if you don’t like what’s coming, you sometimes have to just take what
3 you have and hope that the[y] don’t end up on the jury.” *Id.* at 45, 53.

4 Petitioner also argues that juror Linda K., who was passed by the prosecutor but
5 ultimately excused by the defense, is comparable to Sallie T. Both Ms. K. and her husband
6 worked for the California Department of Corrections. ART at 134. However, like Sallie T., Ms.
7 K had a relative who was in prison. Her brother was convicted of a “drug-related assault” and
8 was incarcerated in Southern California. *Id.* at 131. The prosecutor passed three times with
9 Linda K. on the jury. RTEH at 34-35. When asked why, he explained:

10 Q. And you did that on the strength of what, her relationship to
11 CDC and to – relationship to CDC and law enforcement?

12 A. I did it on the strength of the fact that I knew the defense
13 lawyers would kick her off. Or I gambled that they would, and
14 they did.

15 I did the same thing with Mr. Becker, he was a juror I passed four
16 times on and –

17 Q. Mr. who?

18 A. Becker. I passed on him four times before the defense kicked
19 him off. I mean, because I had a lot more challenges than the
20 defense.

21 Q. Sure.

22 A. So I could take those, and there was – there were a lot of jurors
23 that the defense needed to kick off because they had a lot of law
24 enforcement background, and you know, they gambled – the
25 defense lawyer will gamble the same way a D.A. might on
26 something like that. They can’t – they need to kick somebody off
who’s got a law enforcement background because they just don’t
know for sure what they’re going to do.

Id. at 35.

27 In short, the prosecutor provided credible, non-discriminatory reasons for each of his
28 decisions in question regarding the use of his peremptory challenges. He explained that he
29 excused Sallie T. because “a lot” of people in her family had been locally prosecuted for armed

1 robbery and “muggings.” He explained that he did not excuse two alternate jurors who each had
2 one family member who had been convicted of a crime because they were alternates and he did
3 not “use the same criteria” with alternates. The prosecutor also mentioned that he had fewer
4 challenges with alternates and therefore fewer opportunities to “kick people.” With regard to
5 juror Linda K., who also had a family member in prison, the prosecutor explained that he
6 believed the defense would challenge her so he did not waste a peremptory challenge on Linda
7 K.

8 Petitioner argues that the prosecutor’s explanation that he passed with Linda K. on the
9 jury because of his belief that the defense would excuse her, and not because of the more
10 obvious reason that she had a law enforcement background, is a “palpable lack of forthrightness”
11 that “must weigh heavily against his overall credibility.” Petitioner’s Brief at 20. The court
12 disagrees. Although the prosecutor’s strategy was a gamble, it is certainly not implausible or
13 fantastic. It is not improper for a prosecutor to rely on his instincts with respect to the voir dire
14 process. *See United States v. Power*, 881 F.2d 733, 740 (9th Cir. 1989) (quoting *United States v.*
15 *Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989)). Further, the prosecutor appeared to this court to
16 be sincere when he testified that this was his actual reason for passing the jury several times with
17 Linda K still seated.

18 It is true that the prosecutor’s justification for excusing Sallie T. is undermined by the
19 fact that juror Linda K. and alternate jurors 1 and 3 also had relatives who had been prosecuted
20 for violent crimes. The prosecutor could have used some of his peremptory challenges to excuse
21 these jurors but chose not to do so. The fact that the prosecutor’s proffered reason for striking
22 Sallie T. also applies to these sitting jurors is arguably “evidence tending to prove purposeful
23 discrimination to be considered at *Batson*’s third step.” *Miller-El*, 545 U.S. at 241. Further,
24 although the prosecutor explained that he did not want to use up his peremptory challenges on
25 the alternate jurors, the record reflects that he exercised no challenges with respect to the
26 alternates. Thus, this fact can be viewed as undermining that particular justification. *See*

1 *McClain*, 217 F.3d at 1221 (“The fact that one or more of a prosecutor’s justifications do not
 2 hold up under judicial scrutiny militates against the sufficiency of a valid reason”).¹² However,
 3 the fact that an excused juror shares one or more characteristics with seated jurors does not end
 4 the inquiry into discrimination in jury selection, nor does it establish that the prosecutor was, in
 5 fact, acting with discriminatory intent. Rather, the court must evaluate the “totality of the
 6 relevant facts” to decide whether “counsel’s race-neutral explanation for a peremptory challenge
 7 should be believed.” *Ali*, 2009 WL 3401452, at *5. Here, the prosecutor’s testimony explaining
 8 his decisions was credible.

9 The similarities between Sallie T. and several of the seated jurors do not undermine the
 10 prosecutor’s stated reason for excusing Sallie T. under the facts of this case. Unlike Sallie T.
 11 there is no evidence that the relatives of the alternate jurors or Linda K. were prosecuted by the
 12 same district attorney’s office in which this prosecutor was employed. The prosecutor
 13 specifically referred to his concern that someone whose relative was prosecuted by “the D.A.’s
 14 office” might be less sympathetic to the prosecutor in this case. Further, Sallie T. stated that she
 15 had “numerous people” in her family in jail. This was not true of alternate jurors 1 and 3 or juror
 16 Linda K. The prosecutor explained that he did not use the same criteria with alternates that he
 17 did with his “main group” of jurors. Although he did not exercise any challenges with respect to
 18 his alternates, his use of a less rigorous standard with respect to jurors who will probably not be
 19 involved in the deliberations is not implausible or unbelievable. Further, petitioner’s jury did
 20 contain one African-American juror. “The fact that African-American jurors remained on the
 21 panel ‘may be considered indicative of a nondiscriminatory motive.’” *Gonzalez v. Brown*, ____
 22 F.3d ____, 2009 WL 3489426, at *5 (9th Cir. (Cal.) (quoting *Turner v. Marshall*, 121 F.3d 1248,
 23 _____)

24 ¹² The prosecutor could not remember why he failed to exercise a strike against alternate
 25 juror 3. Any speculation or guess as to why he might have retained this or any other juror is
 26 irrelevant to the issues before the court and will not be considered. See *Paulino v. Harrison* 542
 F.3d 692, 700 (9th Cir. 2008) (a prosecutor’s mere guess as to why she might have removed
 certain jurors does not provide circumstantial evidence of her actual reasons and is insufficient to
 meet the state’s burden of production).

1 1254 (9th Cir. 1997)). *See also Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994) (fact that jury
 2 contained an African-American member is “a valid, though not necessarily dispositive,
 3 consideration in determining whether a prosecutor violated *Batson*”). Finally, as discussed, the
 4 undersigned finds the prosecutor to be a credible witness overall.

5 After a review of the entire relevant record, the court concludes that the prosecutor’s
 6 stated reason for excusing Sallie T. was his genuine reason for exercising a peremptory strike,
 7 rather than a pretext invented to hide purposeful discrimination. Accordingly, petitioner has
 8 failed to carry his burden of proving the existence of unlawful discrimination with respect to the
 9 prosecutor’s challenge to Sallie T.

10 (b). Veronica M.

11 At the evidentiary hearing, the prosecutor explained that he exercised a peremptory
 12 challenge against Veronica M. because she “had sat on a prior jury that had hung” and because
 13 she worked for the “Department of disability, Adult Services,” which struck him as a job that
 14 was “social worker-esque.” RTEH at 10. He explained,

15 Veronica Moseley. There were two reasons for Veronica Moseley.
 16 One is that she did not – she had sat on a prior jury that had hung.
 17 Those are always tough calls for sure. You don’t know exactly,
 18 because we don’t ask them if they were for prosecution or against.

19 So typically that’s – it’s a factor that you have to consider, and you
 20 know, you never know which direction for sure. They might have
 21 been prosecution jurors. They might have been defense. It’s
 22 usually one of those things that you just – it’s hard, but you can’t
 23 take a risk, so typically, I would remove people, but now always. I
 24 mean, it just depended on other factors as well.

25 But she also had another strike against her in my mind, that she
 26 worked for Department of disability, Adult Services, and although
 I would have liked to have done follow-up questioning with
 somebody with a background like that to find out exactly what it is
 they do on a day-to-day basis at work, Judge Ford did not allow us
 to ask questions, and Judge Ford did not ask a lot of questions
 himself.

So you were stuck, and I was certainly stuck with the bare
 minimum of what they do for a living, and whether that factors
 into some sort of preconceptions I have about that type of work,

1 and in her case, she seemed – it seemed a little more social worker-
2 esque, if I can use that term. And people in the helping
3 professions, as a rule, I’m cautious about. It doesn’t always apply,
4 but it’s a rule of thumb that I look at, and in her case, I certainly
5 did, and so the combination of those two things for me was
6 sufficient for me to dismiss her for – or use a peremptory challenge
7 on her.”

8 *Id.* at 10-11. Later in the proceedings, the prosecutor explained that, while Veronica M. had a
9 brother in law enforcement, that positive factor “didn’t necessarily overcome the fact that she
10 had sat on a prior hung jury and that she had this other – her employment history was a little
11 more in the social work kind of vein.” *Id.* at 36.

12 As in the case of Sallie T., the prosecutor’s stated reasons for exercising a peremptory
13 challenge against Veronica M. are facially race-neutral. Accordingly, the court moves to the
14 third step of the *Batson* analysis. Standing alone, the prosecutor’s reasons are recognized
15 grounds for a peremptory challenge. *See, e.g., United States v. Thompson*, 827 F.2d 1254, 1260
16 (9th Cir. 1987) (“Excluding jurors because of their profession, or because they acquitted in a
17 prior case . . . is wholly within the prosecutor’s prerogative”). However, the question at the third
18 step of the *Batson* analysis is whether these are the actual reasons for the prosecutor’s strike of
19 Veronica M., or simply a pretext.

20 Petitioner argues that Veronica M. had the same characteristics as juror Medina, who was
21 excused by the defense but passed by the prosecutor twice. As described above, Veronica M.
22 had served on a hung jury and her brother worked for the Department of Corrections. Juror
23 Medina, who was Hispanic, had also served on a jury that was unable to reach a verdict. In
24 addition, he had several relatives with a law enforcement background, which was arguably a
25 factor favorable to the prosecution. Petitioner’s Evidentiary Hearing Exhibit 1, tab marked
26 “Medina;” Petitioner’s Post-Evidentiary Hearing Exhibit A-1, at 000088. When asked why he
did not exercise a peremptory challenge against juror Medina, the prosecutor explained:

Q. I want to talk about another juror that you did pass on while he
was on the panel, a Mr. Frederick Medina. Do you recall any
information about Mr. Medina’s background?

1 A. I do recall. He has several people in law enforcement in his
2 background. He had – I think there was a brother-in-law, or
3 something like that was a CHP, there was somebody else in the
4 police department or something of that nature, and then he had
5 somebody that he knew in the Department of Corrections. That's
6 what – I remember he had that. He was an engineer, I think for the
7 Air Resources Board as well.

8 * * *

9 Q. Now, do you recall whether – well, there's information in the
10 record that he had served on a jury that had also failed to reach a
11 verdict. Do you recall why you chose to pass while Frederick
12 Medina was on the panel?

13 A. If I could point out, although I passed, I had – was – he was
14 removed by a defense attorney before we were even finished
15 selecting the jury. It really ultimately would have depended on
16 what that final jury makeup was if I would have exercised a
17 challenge on him.

18 My guess is I would have ultimately removed him myself, but a
19 defense attorney did it for me, and that's one of the things you do,
20 I think, as a trial lawyer is, it's always a certain bit of playing
21 poker and – or even chess, depending on what you're – how you
22 want to make the comparison, but I always viewed it as I want to
23 use the least number of challenges I can to stay ahead of the
24 defense, so I don't get stuck letting the defense attorney chose [sic]
25 the jury that ultimately sits.

26 And in this case, I had an equal number of challenges, but the
27 defense attorney – I mean, they had to burn through several of the
28 people on the jury. They typically remove people with law
29 enforcement backgrounds, and sometimes some of those same
30 people with law enforcement backgrounds for some reason I don't
31 want on there. And so – but I can safely wait, because I know
32 they're going to kick, and in this case I had three defense lawyers
33 who rarely agreed on anything.

34 So I knew that one of them was going to kick several of the jurors
35 that I ultimately didn't want. So I passed on a lot of jurors that I
36 didn't want, Mr. Medina being one of those that if it came down to
37 it at he [sic] end of the jury, and I'm looking around at that jury,
38 maybe I would have kept him because it would have balanced out
39 because he did have a lot of law enforcement.

40 But it was one of those strategic gambles I guess I engaged in, and
41 in this case, the ultimate – my final decision was made easy for me
42 by the defense attorney.

43 RTEH at 12-13.

1 Petitioner also points out that there were other jurors whose jobs appeared to be “social
2 worker-esque,” thereby placing them in the same category as Veronica M. For instance, Juror 12
3 was a retired Job Corp coordinator and had no “offset, such as family or friends involved in law
4 enforcement.” Petitioner’s Brief at 14; Petitioner’s Evidentiary Hearing Exhibit A at 000058-59.
5 Juror 11 worked for Young Health Systems, where he admitted patients for surgery. Petitioner’s
6 Evidentiary Hearing Exhibit A at 000055. Juror 3 was a retired registrar from the Sacramento
7 City Unified School District. *Id.* at 000021. In addition, petitioner provides evidence that
8 Veronica M. was “an office worker,” and that her job duties probably did not involve actual
9 social work. Petitioner’s Brief at 13-14. He argues that the prosecutor’s conclusion that she was
10 “a social worker of any sort is pure, unadulterated speculation on his part, without any basis in
11 fact, or record to support it.” *Id.* at 13.

12 Petitioner’s argument that Veronica M. was an office worker and not a social worker is a
13 red herring. First, it appeared that the prosecutor was more concerned about where Veronica M.
14 worked than the exact nature of her duties. Second, he was not allowed to ask voir dire
15 questions. Therefore, he was unable to question Veronica M. about the particulars of her job and
16 had to use his instincts, to some extent, to gain a sense of each particular juror. Under these
17 circumstances, a comparison of the job duties of various jurors to determine whether their
18 employment was actually in the nature of social work is not particularly helpful. More relevant
19 to the *Batson* analysis is the fact that none of the above-described jurors had also served on a
20 hung jury, as had Veronica M. The prosecutor explained that it was the “combination” of the
21 two negative factors that caused him to challenge Veronica M.

22 Petitioner also compares Veronica M. to Juror 1. Juror 1 had served on a hung jury and
23 “was a true social worker, a chaplain.” Petitioner’s Brief at 15. Like Veronica M., juror 1 had
24 lived in Sacramento County for over 20 years. At the evidentiary hearing, when asked why he
25 chose to keep juror 1 on the panel when he had seemingly identical negative characteristics to
26 Veronica M., the prosecutor responded as follows:

1 A. . . . Mr. Stengland – this is again one of those reasons why you
2 can't have – I think as a lawyer you can't have hard and fast rules
3 of who you kick and who you don't kick. Mr. Stengland is one of
4 those guys who has – I would definitely consider him to be in the
5 helping professions, which I'm typically cautious about, but I was
6 not of him, because my father is a minister, and two of my brothers
7 are.

8 And so it – so as – because I have so much experience, I guess,
9 with people that I know that are close to me, that are ministers, the
10 fact that he's a chaplain, I think I have a certain insight into what
11 they do and how they think that makes me somewhat more
12 favorable towards keeping someone like them. He was – this guy
13 had multiple – you know, he had children, he was married, he's
14 lived in the county for well over 20 years, and clearly invested.

15 And then you had the – then you balance that with the jury issue.
16 He had the – he had a civil jury he sat on where they reached a
17 verdict, a criminal case they did not reach a verdict, and then I
18 think he was called one other time, and I don't think he ultimately
19 sat on a jury.

20 So I balanced that out. Here's a guy that he has a mixed bag, one
21 case where they did reach a verdict, one case where he did not, but
22 ultimately, I'm comfortable with him, and he just reminded me a
23 lot of my dad. My dad in my mind in [sic] the ultimate juror. I
24 mean, I think he's smart, he's compassionate, he's not – and I
25 think he would be fair, and I think he also has a certain ability
26 because of what he does to sift through the – I guess some of the
things that happen in court, which is either the questioning, or the
way witnesses act, the – some of the drama of a courtroom can
throw some people. And I think because of what he does for a
living, and the kind of things he encounters, I just think he would
make a good juror. And that's what I thought about with Mr.
Stengland, he just – he seemed like he would be a good juror to
me.

20 RTEH at 14.

21 Again, the prosecutor explained in a credible manner the non-race based reasons for his
22 decision. He testified that he excused Veronica M. because she had served on a hung jury and
23 she also worked in a profession that appeared to him to be in the “helping profession,” or “social
24 worker-esque.” He passed the jury with juror Medina, who had also served on a hung jury,
25 because he expected the defense would eliminate him. He accepted juror Stengland, who had
26 both of the negative characteristics of Veronica M., because Stengland reminded him of his

1 father and he felt his father would be a model juror.

2 The court notes that the prosecutor's reason for passing a jury which contained juror
3 Medina was equally applicable to Veronica M. Both of these jurors had relatives who were in
4 law enforcement. The prosecutor was not asked, and he did not explain, why he did not wait for
5 the defense to excuse Veronica M. before excusing her himself, as he did with juror Medina.
6 However, the prosecutor explained that he struck Veronica M. because she had two "strikes"
7 against her: the fact that she had served on a hung jury and the nature of her job. Juror Medina
8 worked for the Air Resources Board, which is not an entity that could be described as "social
9 worker-esque." Therefore, Medina did not have the second "strike." The fact that juror Medina
10 shared one characteristic with Veronica M. is not necessarily dispositive of the *Batson* issue.
11 Veronica M. was excused because of the combination of two negative factors, and not just
12 because she had served on a hung jury. *Cf. Ali*, 2009 WL 3401452, at *6 (quoting *Kesser*, 465
13 F.3d at 360) ("where 'an evaluation of the voir dire transcript and juror questionnaires clearly
14 and convincingly refutes *each* of the prosecutor's non-racial grounds, we are "compell[ed] [to
15 conclude] that his actual and only reason for striking [the relevant juror] was her race")
16 (emphasis added). The court also notes that the prosecutor had only exercised nineteen of his
17 thirty-five peremptory challenges when the jury, with one African-American on the panel, was
18 finally accepted by all parties. Respondent's Brief at 1. This factor is a "relevant circumstance"
19 in determining whether unlawful discrimination has taken place in jury selection. *See Gonzalez*,
20 2009 WL 3489426, at *5 (noting that "the prosecutor still had six peremptory strikes that she
21 could exercise – quite a few – and she did not excuse any of the remaining African-American
22 jurors"). Finally, the court notes that the prosecutor testified he might have removed Mr. Medina
23 himself but was spared the use of another strike when the defense challenged Medina before jury
24 selection was completed. Although there is no evidence either way, the dynamics of jury
25 selection point out the difficulty in assessing a prosecutor's true intentions, especially when, as
26 here, those intentions cannot be interpreted using an analysis of questions the prosecutor asked

1 potential jurors during voir dire. *See Miller-El*, 545 U.S. at 238 (“the rub has been the practical
2 difficulty of ferreting out discrimination in selections discretionary by nature, and choices
3 subject to myriad legitimate influences, whatever the race of the individuals on the panel from
4 which jurors are selected”).

5 With regard to juror 1, the prosecutor explained that his instincts and experience with his
6 family caused him to accept this juror, even though he shared the same two negative “strikes”
7 with Veronica M. He was also aware that juror 1 had served on one jury that was able to reach a
8 verdict, thereby neutralizing, to some extent, the fact that he had also served on a jury that was
9 unable to reach a verdict. As explained above, instinct and subjective factors have a legitimate
10 role in the jury selection process. *Id.*, 545 U.S. at 252; *Burks*, 27 F.3d at 1429, n.3 (“peremptory
11 strikes are a legitimate means for counsel to act on . . . hunches and suspicions”). The
12 undersigned believed the prosecutor when he explained why he chose to keep juror 1 on the
13 panel even though he looked, on paper, to be identical to Veronica M. in terms of “strikes”
14 against him. Put another way, the prosecutor’s demeanor did not “belie[] a discriminatory
15 intent.” *Snyder*, 552 U.S. ___, 128 S.Ct. at 1208.

16 Overall, the validity of the prosecutor’s decision to challenge Veronica M. appears on the
17 surface a close question. However, after an analysis of the “totality of the relevant facts,”
18 including an assessment of the prosecutor’s credibility on the witness stand, the fact that the
19 prosecutor was not allowed to question any of the potential jurors himself, the fact that some of
20 the prosecutor’s reasons stand up to close scrutiny and none are false or based on stereotypes of
21 any particular race, and the fact that one African-American juror sat on petitioner’s jury, this
22 court concludes that the prosecutor’s peremptory challenge of Veronica M. was not motivated by
23 the race of this juror.

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1 **IV. Conclusion**

2 Accordingly, for all of the foregoing reasons, IT IS HEREBY RECOMMENDED that
3 petitioner's application for a writ of habeas corpus be denied.

4 These findings and recommendations are submitted to the United States District Judge
5 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one
6 days after being served with these findings and recommendations, any party may file written
7 objections with the court and serve a copy on all parties. Such a document should be captioned
8 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
9 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
10 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In
11 his objections petitioner may address whether a certificate of appealability should issue in the
12 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing
13 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it
14 enters a final order adverse to the applicant).

15 DATED: December 21, 2009.

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17 EDMUND F. BRENNAN
18 UNITED STATES MAGISTRATE JUDGE
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